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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

OPPOSITION TO PETITIONS FOR RECONSIDERATION

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SUMMARY

Continental Cablevision, Inc. submits that the Commission may not require a cable operator to make the identical choice of either cost of service or the benchmark formula to justify both basic and satellite tier rates. The 1992 Act prescribes different standards and procedures for basic and for satellite tier regulation, and commits them to separate sovereigns. Proposals that would forbid an operator like Continental from offering low cost "benchmark" basic if it planned to justify above benchmark prices for tiers would turn the Act on its head. It would forbid the discounting of basic, contrary to the Act's clear mandate for basic rates capped by the rates in competitive markets, and would at least double the social cost of regulation when an operator would have been satisfied (and society better served) by cost of service proceedings limited to one tier. The proposal would increase, not decrease, cost of service filings.

The Commission may not delegate to franchising authorities the power to dictate the number of channels on the basic service tier. This is nothing less than a grab for control over rates for satellite delivered programming services. Demands for a high number of basic channels would force Continental to collapse satellite tiers into basic. The jurisdictional division required by Section 623 would be nullified. Indeed, cable operators like Continental would be divested of the editorial

discretion Congress reserved to them over the content and configuration of service tiers.

Requests for reconsideration of both the direct pass through to subscribers of certain external costs and line itemizations seek to hide the governmental source of many costs. The Commission must maintain political accountability for these costs. Extraordinarily expensive demands of franchising authorities in recent years have been limited only by the imagination of their consultants. Continental's recent forced settlement in St. Paul, for example, imposes over $1.50 of new capital and operating expenses per subscriber per month over the next seven years. To avoid confiscation, customers must ultimately pay the mandated operating costs. Particularly when these demands are of greater benefit to politicians and their consultants, the public has a right to know the source and beneficiaries of these hidden taxes. External costs, such as PEG, I-Nets and the like, must be included as externals. It is specious to suggest that only a 5% franchise fee is governmentally controlled, or that the benchmarks already account for all costs of municipal demands. Passing these costs through maintains the reasonableness of the pre-existing rates, while line itemization assures political accountability for the new costs.

Requests that the Commission consider any increase in the number of activated channels of the cable system since passage of the 1992 Cable Act as an evasion must be rejected as municipal overreaching. Congress, the FCC, franchise renewals, and subscribers all encourage (and sometimes demand) increased channel offerings. It is simply good business, and good public policy, to provide additional capacity when feasible.

The Commission and local regulators should follow reasonable, workable procedures for the rate regulation process. Local rules for rate regulations must be consistent with the FCC's specified regulations. Section 623 requires that franchising authorities must certify to the FCC that their procedures are "consistent" with the FCC's. Continental should not have to accommodate different procedures in each of the 600 communities it serves.

Requests that the Commission establish a single "initial regulation" date contradict Section 623's bifurcated system of regulation, and must be rejected. Likewise, the statute explicitly limits refunds to charges paid <u>after</u> the filing of a complaint for tier. The Commission may not order a refund of payments made prior to filing of a complaint, and prior to the effective date of the rules.

The 1992 Cable Act does not permit municipal authorities to initiate cost of service proceedings.

The FCC's procedures for protection of proprietary information must be the minimum protection to cable operators. Any other system threatens dissemination of information to the competitive disadvantage of cable operators.

Continental believes that agreements as to cable rates and services should be allowed, because they are frequently the best solution. Such agreements, however, are gentlemen's agreements, which either party can terminate at will.

The Commission should not further restrict its definition of "effective competition." SMATV and TVRO are demonstrated competitive forces that are "available" nationwide, bolstered by the recent actions of the FCC and Congress. Proposals that would "count" only cable competitors with substantially the same number of satellite channels offered by the cable operator must be rejected because the formula would eliminate even the most fiercely competitive wireless cable operator from the calculus. Mandatory access to the most popular programming services permits formidable competition, regardless of channel numbers.

Section 623 requires the FCC's current interpretation of 30% penetration. It defines effective competition so as to include systems where "fewer than 30% of the households in the franchise area subscribe." Franchising authorities control the definition of "franchise area," and may not have the Commission rewrite their franchises.

Only rates in communities subject to regulation may be limited by the uniform rate requirement. "Uniformity" is a form of rate regulation prohibited in competitive markets.

Continental urges the Commission to retain the maximum implicit net fee formula for commercial leased access, with no special content-based subsidies, with the clarifications set forth below. The Commission should reject first-come first-served access, as well as special minority or educational set-asides. Terms and conditions for carriage must be left to negotiation between the parties. The Commission's new expeditious dispute resolution procedures can effectively handle any disputes that arise.

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Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)	MM Docket No. 92-266

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Continental Cablevision, Inc. ("Continental") hereby opposes the requests for reconsideration filed June 21, 1993 by the National Association of Telecommunications Officers and Advisers, et al. ("NATOA"), King County, Washington, et al. ("King County"), and the prospective commercial channel lessees who have surfaced on reconsideration.

I. CABLE OPERATORS MUST BE PERMITTED TO ALTERNATE BETWEEN COST OF SERVICE AND BENCHMARK JUSTIFICATIONS FOR BASIC AND SATELLITE TIER RATES

At a time when deregulation permitted MSOs to offer only a combined broadcast basic and satellite tier as their lowest level of service, Continental maintained low cost broadcast basic service nationwide. The 1992 Act plainly expresses a preference for such low cost basic service. Throughout this rulemaking, Continental has supported the establishment of benchmark standards for basic service which are premised on the nonremunerative rates in markets with "effective competition." Continental has been prepared to continue providing basic at a loss and to make its reasonable return from satellite tier services, for which it pays considerably more in license fees and marketing expenses, and expects more in revenues.

As described in Continental's Petition for Reconsideration, the Commission's Report & Order in this proceeding renders this kind of socially responsible pricing impossible. In adopting a uniform "tier neutral" benchmark and an arbitrary 10% across the board cut, the Commission has mandated that all regulated service tiers be priced at noncompensatory lifeline levels and thus has eliminated the revenue which sustains lifeline prices. Without fundamental reform of the benchmarks--that is, without decoupling satellite tier prices from the arbitrary pricing standards drawn from the handful of overbuild markets--Continental will be forced in many markets to resort to cost of service ("COS") showings to demonstrate, case by case, that the FCC's benchmarks are noncompensatory for an overwhelming number of its cable systems. Yet Continental has remained willing, as it was when deregulated, to continue to offer low cost basic service (or what is now benchmark basic), and seek a reasonable return from the satellite tiers which are its core business, if Commission procedures allow it to recover its real costs for the satellite tiers.

Now NATOA has offered the perverse suggestion that the FCC should not even entertain a cost of service showing unless the cable operator is pursuing a cost of service case for basic service before the local franchising authority. NATOA at 38. On its face, the suggestion is contrary to the letter of the law and to its underlying premise. The 1992 Act prescribes different standards and procedures for basic and for satellite tier regulation, and commits them to separate sovereigns. The Act is premised on explicit Congressional orders for the Commission to maintain administrative efficiency, to assure administrative economy for small systems, and to avoid recreating Title II.[1/] NATOA proposal would undermine each of these goals. Most importantly, it would make impossible fulfillment of the Act's one clear mandate for low cost rates: basic rates are to be capped by the rates prevailing in markets with effective competition. 47 U.S.C. § 543(b)(1).

NATOA's proposal would forbid an operator from offering below cost "benchmark" basic if the operator planned to justify above benchmark prices for tiers. The proposal would turn the Act on its head: it would forbid the discounting of basic; arbitrarily require an operator to make the same case before two different sovereigns for two different levels of service which are already subject to different statutory standards; and at least double the social cost of regulation, by compelling local cost of service cases (and FCC review thereof), when an operator would

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1/ See Rate Regulation Report and Order, MM Docket No. 92-266, 58 Fed. Reg. 29736 (released May 3, 1993) ("R&O") at ¶ 8 (citing legislative history); 47 U.S.C. § 543(i) (small system burdens); 47 U.S.C. § 541(c) (no Title II regulation).

have been satisfied (and society will have been better served) by cost of service limited to the satellite tier.

Nothing in the record suggests a rational basis for insisting that cost of service be pursued at all levels of service or none at all. By design, COS studies will be submitted only for systems which cannot survive under benchmarks. By regulation, common costs must be properly allocated among channels, whichever method of regulatory case is pursued. If the Commission is concerned over improper allocation of costs to one service tier, it need only develop appropriate cost allocation rules: it is under no duty to prohibit an operator from waiving recovery of those properly allocated costs from a low-priced basic service tier. Indeed, punctilious allegiance to tier neutral cost recovery seems a bit out of place under a set of regulations which have been adopted with no cost record at all, and under which none of these above benchmark costs would be recovered from any tier in the absence of a COS case.

Some have suggested that the Commission has done everything in its power to discourage the filing of cost of service cases. For example, its procedures demand a COS election prior to finalization of the COS rules. Further, the submission of a COS case pulls the floor out from under an operator's rates, leaving them subject to any reduction which a franchising authority deems "rational." R&O at ¶ 149. Many have speculated that insisting that COS be prosecuted at the local level is part of that same pattern, and is intended to discourage operators from pursuing their due return at the FCC, by demanding that they place their fate in the hands of local governments whose capability and political willingness to conduct a fair COS case is questionable.

Despite an intent to establish benchmarks and price caps as the "primary" method of rate regulation, Rate Regulation (Cost of Service NPRM), FCC 93-353, MM Docket No. 93-215 (July 16, 1993), the Commission's benchmarks are noncompensatory for an overwhelming number of systems. Consequently, it is arbitrary and capricious to adopt a scheme that fails to provide a reasonable opportunity to demonstrate actual costs and actual confiscation. Forcing operators to double the number of cost of service cases will not make benchmarks more compensatory and will not eliminate the need for COS filings. It will increase, not decrease, COS filings, and will force the Commission to devote even more of its resources--through review of local decisions--to what should have been a sideline of rate regulation. Moreover, it would impose the most backward incentive ever devised: an effective prohibition against cable operators continuing to provide lifeline basic services under color of an Act which was intended to provide precisely those lifeline basic services.

Accordingly, the Commission should reject NATOA's proposal, and maintain an operator's right to pursue a cost of service case for one service tier and to apply benchmarks for another.

II. FRANCHISING AUTHORITIES MAY NOT ESTABLISH THE NUMBER OF CHANNELS ON THE BASIC SERVICE TIER

NATOA argues that its members have the power under the Cable Act to dictate the number of channels on basic. NATOA at 29. Such a power would permit franchising authorities to insist on so many basic channels that they will control the rates of every satellite-delivered programming service. Every franchising authority dissatisfied with Congress's decision to leave satellite tier regulation to the FCC could follow the lead of Dubuque and demand that basic consist of a minimum of 60 (or more) channels.[2/] An operator effectively would be compelled to melt down satellite tiers into basic. Section 623's deliberate jurisdictional division between local and national satellite services would be nullified. The "Dubuque exception," codified at Section 623(j) to grandfather a unique franchise, would expand to swallow the rule.[3/] NATOA's request is simply one more effort by local franchising authorities to seize power which Congress has vested in the FCC over national satellite services.

2/ Dubuque and its franchised operator settled a dispute over rate regulation with an agreement that dictated the minimum number of basic channels and froze rates for five years (with limited increases for increased programming and copyright costs). Cable TV Franchising, June 30, 1989 at 10

NATOA's request would eliminate the editorial discretion Congress vested in cable operators like Continental over the content and configuration of their basic and satellite tiers. Congress established mandatory broadcast and PEG components of the basic service, to which "a cable operator may add additional programming video programming signals or services" at regulated rates. 47 U.S.C. § 543(b)(7)(B). This scheme vests the cable operator with discretion to determine the content of basic beyond the required minimum. This system is consistent with existing Section 624(f)(1), which prohibits any governmental entity from "impos[ing] requirements regarding the provision or content of cable service." The legislative history of this provision, contained in the 1984 Cable Act, clarifies that a franchising authority may not require any particular "service package." H.R. Rep. No. 934, 90th Cong., 2d Sess. at 69 (1984). Nothing in the 1992 Cable Act changes this.

NATOA claims that fragments of Sections 625 and 626 of the 1992 Cable Act give its members power to control the number of basic channels. NATOA at 29-32. But these provisions must be read in the context of Sections 623 and 624, and in any event, do not have the meaning NATOA ascribes to them. NATOA argues that local governments can limit, by franchise, Section 623's declaration that "a cable operator may add additional video programming signals." However, allowing cities to legislate the discretionary "may add additional programming" into "may not" would nullify the discretion granted by Section 623(b)(7)(B). A cable operator

NATOA's request would also wreak havoc on cable operators' copyright liability. Copyright royalties under the compulsory license are measured as a percentage of the revenues received for tiers containing broadcast signals. 17 U.S.C. § 111(d)(1). By separately pricing satellite services (for which license fees have already been paid under affiliation agreements) on a satellite tier, and placing all broadcast and superstation signals on basic, cable operators are able to avoid the anomaly of paying broadcast royalties on revenues received from the sale of satellite services. The 1992 Act confers no power upon franchising authorities to increase a cable operator's copyright liability. Indeed, the legislative history of the 1992 Act dis-

Municipal demands in recent years have been limited only by the imagination of their consultants: from reimbursement of extraordinarily expensive "consulting fees"; to collection of "renewal application fees"; to demands for multiple access channels, access studios, access support, training, and personnel; to restoring St. Paul's Union Depot and similar sites as anchors for redevelopment;[4] to I-Nets and peripherals and emergency alert systems; to alternative access. As with any business, customers

NATOA presents a smorgasbord of small points which eat away at political accountability and which, if adopted, would be a formula for still further confiscation. It asks that line itemized expenses ignore any demand deemed a "settlement," or "voluntary"; exclude overhead; spread out up front lump sums over 15 years; ignore any PEG equipment if ever used for local origination; exclude costs of unilateral customer service ordinances; and indeed, ignore any non-cash municipal requirement entirely, as if municipal demands for I-Nets could be magically satisfied without cash. NATOA at 4-10. NATOA also asks that external costs be limited solely to those franchise fees paid as a direct cash percentage of revenues, so that a franchising authority could impose drastic new demands in the renewal process yet prevent the pass through of their costs to customers. NATOA makes the false assumption that systems priced at benchmark rates could economically deliver even more services than overbuilt systems without any cost recovery. Its requests are improper, illegal, and destructive of political accountability.

External costs, such as PEG, I-Net, and the like, must be included as externals. It is specious for NATOA to suggest that only the 5% franchise fee creates a govermentally-controlled cost. Section 622 itself defines far more assessments as franchise fees, and even those which are not so defined impose costs attributable to the franchise grant. It is even more specious to claim that the benchmarks already account for all costs of municipal demands, merely because the costs of some may have been included in the FCC's sample. NATOA has deliberately confused line itemization with external costs. For purposes of political accountability, even franchise costs embedded in current rates should be line itemized. For purposes of cost recovery, increases in such costs must be treated as externals. If a rate is reasonable today, there is no basis for allowing municipal renewal consultants to prey upon operators with new demands, the costs of which cannot be recovered. Only external treatment of these costs fulfills the commands in Section 623 that rate regulations for both basic and satellite tier take into account the costs of satisfying franchise requirements for PEG and "any other service." Passing these costs through maintains the reasonableness of the preexisting rate, while line itemization assures political accountability for the new costs.

Nor is there any basis for excluding costs as "voluntary" or "settlement" costs. Such a rule would open up a loophole sufficient to swallow the rule. The City of Dayton, Ohio, for example, was dissatisfied with Congress' insistence that the largesse would constitute a breach of franchise. Likewise, it is routine for municipal cable consultants to pore through archives to concoct a claim of breach, which the city or county will "settle" for some favorable cash grant in the renewal process. In St. Paul (represented by King County's consultant), for example, Continental was recently forced, through a baseless claim of breach and the spectre of overwhelming litigation costs, to "settle" for total capital and operating expenditures of over $5.1 million (from November 1992 through May 1999), in addition to 5% franchise fees. This sum alone amounts to at least $111 in added cost for each of Continental's approximately 46,000 subscribers, or more than $1.50 per month per subscriber. NATOA and King County's request to pretend that "voluntary" payments and "settlement" payments cannot be externals ignores the reality of franchising today. These devices are just one more disguise for local taxation, the costs and accountability for which must be assured.

Similarly, franchising authorities should not have the right to dilute the operator's recovery of the costs of franchise demands by excluding the very overhead they demand be committed to their satisfaction or by laundering the costs over time. For example, PEG channels are required by statute to be carried on basic, making it irrational and inconsistent to spread the costs over optional tiers. PEG channels are typically required as a condition to delivering any cable service in a market; the costs should therefore be recovered from all basic subscribers. Likewise, Continental is routinely required to commit part of its facilities to studio space, and to support it, with personnel, evening hours, and the like. These are real "overhead" costs which are demanded by local governments. When local access groups ask for assistance with access production, or when a show's quality is improved by using Continental employees to advise on production values and interview techniques, the show arguably becomes "local origination" under the rules; but there is no basis for excluding the cost of the equipment because it has been "used" for LO. As another example, if a city demands $1 million up front to fund an access trust, that cost should be recovered up front as it was incurred. If spread out over time, as NATOA suggests, the financing costs would be entirely confiscated and the political accountability would be lost. If franchising authorities want access support to be recovered over time, they should only demand payment over time, and not in up front lump sums.

The new and future costs of meeting customer service requirements must likewise be passed through to subscribers. Continental has already expended tremendous sums of money and uncountable hours achieving and maintaining a nationally acclaimed level of customer satisfaction. Under the Commission's benchmark theory, these costs incurred before 1993 are accounted for in permitted benchmark rates.

Going forward, however, the benchmarks do not cover the costs of future expenses required to meet customer service standards imposed by franchising authorities. The Commission has decided that a franchising authority may enforce the FCC's new standards _or_ more stringent standards. NATOA's comments in the FCC's customer service proceeding leave no question as to its members' intention to enact extraordinarily stringent standards irrespective of community size or existing levels of satisfaction.

If cable operators are required to build or lease new office space, install expensive telephone equipment, or increase staff to meet customer service standards set by the franchising authority, the cost must be passed through to subscribers. Any other rule would be confiscatory, or would be yet one more factor pushing cable operators into costly, burdensome cost of service proceedings.

NATOA's efforts to curtail line itemization is yet another effort to evade political accountability. Section 622 specifically lists franchise fees, costs of meeting PEG franchise requirements, and taxes as items that a cable operator "_may_ identify." 47 U.S.C. § 542(c). The provision does not purport to define the only items an operator may identify. The only way local politicians will fully consider the impact on subscribers of their franchise demands is through line itemization of the costs of franchise compliance. This is the political accountability Congress envisioned.

IV. ACTIVATION OF CHANNEL CAPACITY IS NEVER AN EVASION

NATOA suggests that any increase in the number of activated channels of a cable system since passage of the 1992 Cable Act is an evasion. It attributes evil intent to all increases in service. In Continental's view, this suggestion is another prime example of municipal overreaching and failure to consider the realities of the cable television business.

Congress, the FCC and franchise renewals all encourage increased channel offerings. Continental switched 45,000 subscribers over the past six months in its Dayton system to upgraded facilities with 25 additional channels; 70,000 more subscribers will have this service by October. Continental is in the midst of a 10-channel upgrade in its Stockton, California system for which it had planned to charge only $1.00 more under deregulation. Such rebuilds are not regulatory ploys, adopted to foil the benchmarks. For Continental to activate additional channel capacity took planning dating back to 1988 in Dayton. Continental rebuilds facilities because subscribers are requesting increased service offerings. It is good business, not a rate regulation "evasion," to provide additional capacity when feasible.

NATOA also disparages cable menu channels as some kind of evasion. In fact, guide channels are like TV listings in newspapers -- consumers would be outraged if they were discontinued. Unlike newspaper listings, however, televised electronic program guides may be programmed at the last minute, and are thus able to be more accurate. Interactive menu services, like Starsight, promise instantaneous program summaries, one touch recording and other interactive benefits. Operators should not be questioned for carrying such menus in a multichannel world, any more than an information service provider should be faulted for providing a gateway.

The programming decisions of Continental and other operators are driven by market forces. In recognition of the thriving market for video program material, the Commission recently reaffirmed in its home shopping order that it will not judge the content of that video programming. Home Shopping Station Issue, FCC 93-345, MM Docket No. 93-8 (released July 19, 1993). The 1992 Act grants the Commission no more authority to make a content-based decision in the area of program guides. The Commission should therefore reject NATOA's request for discriminatory treatment of menu, preview, and other cable television programming.